

In Re:
RESIDENTIAL CAPITAL, LLC, et al. v.
Case No. 12-12020-mg

P.M. SESSION ONLY
September 11, 2012

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1
2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 12-12020-mg

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6 In the Matter of:

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8 RESIDENTIAL CAPITAL, LLC, et al.,

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10 Debtors.

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

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18 September 11, 2012

19 2:04 PM

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21 B E F O R E:

22 HON. MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE
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1 Doc.#810, 859, 861 Evidentiary Hearing Regarding (I) Motion of
2 the Federal Housing Finance Agency Pursuant to the July 11,
3 2012 Order of the Honorable Denise L. Cote Seeking Limited
4 Discovery from the Debtors and, if Necessary to that Purpose,
5 Relief from the Automatic Stay and (II) Supplement to July 17,
6 2012 Motion of the Federal Housing Finance Agency Pursuant to
7 the July 11, 2012 Order of the Honorable Denise L. Cote Seeking
8 Limited Discovery from the Debtors and, if Necessary to that
9 Purpose, Relief from the Automatic Stay. (CC: document(s)
10 1295, 1296, 1297)

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THE COURT: Please be seated. All right. We're here
in Residential Capital LLC, number 12-12020. Mr. Glenn?

MR. GLENN: Good afternoon, Your Honor. Andrew Glenn,
Kasowitz Benson Torres & Friedman along with Kanchana Leung and
Daniel Fliman on behalf of the Federal Housing Finance Agency
acting as conservator for Freddie Mac and Fannie Mae.

Your Honor, we're here pursuant to the adjourned
motion that we filed. We understand that the other parties to
the proceeding before Judge Cote have also filed a separate
motion seeking additional information.

Before we proceed, I wanted to bring one update to
Your Honor's attention; it was a late breaking development
solely from our end. We have consulted with our sampling
experts in this case, and we are prepared further to cut our
request at this point in time by half to 2,500 loan files to be
selected by the expert after the conclusion of these
proceedings. Otherwise, we'll be guided by Your Honor in terms
of how you want to proceed today given the argument that we
presented in the last hearing.

THE COURT: Let me ask you this. Are you introducing
any evidence as part of your affirmative case?

MR. GLENN: No, Your Honor. We have the transmittal
declarations and that's all.

THE COURT: What do you mean by the transmittal

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1 declarations?

2 MR. GLENN: The declarations of Ms. Leung, my partner.

3 THE COURT: All right. Do you want to -- I think
4 what -- if you're going to offer anything in evidence, you
5 ought to do that. Let me ask you, are you going to cross-
6 examine the declarants that ResCap has proffered?

7 MR. GLENN: I don't believe so, Your Honor.

8 THE COURT: Okay. Because this is an evidentiary
9 hearing, if there are -- if there's anything you wish to
10 introduce in evidence, offer it now, okay, including, if you're
11 offering your partner's declaration. Identify it specifically
12 for the record, indicate the nature of the offer, et cetera.
13 Okay?

14 MR. GLENN: We offer the two declarations of Kanchana
15 Wangkeo Leung. One was submitted as part of our application
16 and the other one was a supplement affidavit in our reply
17 briefing.

18 THE COURT: Can you identify those by ECF document? I
19 mean the debtors have put everything together in a binder. Do
20 you have that --

21 MR. GLENN: I believe I have that --

22 THE COURT: It looks like you've got it. It's just I
23 want to be clear what is part of the record before me on which
24 I'm going to rule.

25 MR. GLENN: Docket number 808 and 1296.

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1 THE COURT: All right. Are there any objections to
2 those two declarations? Mr. Haims?

3 MR. HAIMS: No, Your Honor.

4 THE COURT: All right. The two Leung declarations at
5 ECF docket numbers 808 and 1296 are admitted in evidence.
6 (Declaration and supplemental declaration of Kanchana Wangkeo
7 Leung was hereby received into evidence as of this date.)

8 THE COURT: All right. Do you rest at this point?

9 MR. GLENN: Well, on the evidence, Your Honor --

10 THE COURT: Yes.

11 MR. GLENN: -- yes, we rest.

12 THE COURT: Okay. All right. Mr. Haims, are you
13 going to -- I think you ought to start by offering in evidence
14 whatever you're going to proffer.

15 MR. HAIMS: Your Honor, I'd like to start by -- before
16 I just do the evidence, just to say that Your Honor has been
17 clear that the automatic stay applies to third party discovery.
18 And Your Honor also stated that anyone --

19 THE COURT: I was not. I think you misstate what I
20 said. We'll deal with it. I think that the Kasowitz firm
21 accurately collected -- I asked a question whether the use of
22 the term "process" in 362(a) applied to subpoenas -- third
23 party subpoenas. And I may have pondered whether -- you know,
24 why didn't it. But I asked that that issue be addressed in
25 briefs. Kasowitz addressed it and your brief just simply

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1 recites the Court has already determined that 362(a) applies.

2 I did no such thing. I asked a question based on the language
3 of the statute. I asked that it be addressed. You chose in
4 your brief to address it by saying the Court's already decided
5 it. Kasowitz addressed it by addressing the substance of it.
6 I have not decided whether 362(a) applies to subpoenas served
7 in other litigation.

8 MR. HAIMS: Okay, Your Honor. So I will offer into
9 evidence the following declarations. We have the first the
10 declaration of Jeffrey Lipps, which is document number 1023 --
11 1023.

12 THE COURT: Dash -- I'm sorry?

13 MR. HAIMS: Dash 1.

14 THE COURT: Dash 1. Okay. Go ahead. Anything else?
15 I'll take them as --

16 MR. HAIMS: Take -- oh, I'm sorry.

17 THE COURT: Mr. Glenn, are you going to object to any
18 of these declarations?

19 MR. GLENN: Your Honor, I think we have one general
20 subject matter. After all the affidavits are proffered, we
21 would like to address those.

22 THE COURT: That's fine.

23 MR. GLENN: Thank you.

24 THE COURT: All right. Go ahead, Mr. Haims.

25 MR. HAIMS: There's the declaration of John G.

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Mongelluzzo, which is document 1023-2, which was filed on August 7th, 2012.

THE COURT: Okay.

MR. HAIMS: There's the declaration of John G. Mongelluzzo, which is document number 1295-2, filed on August 28th, 2012. There's the declaration of Mary Fahy Woehr, which is document number 1295-1, filed on August 28th, 2012. And the declaration of Philip Marc Scheipe, document number 1299, filed on August 28th, 2012. Those are the declarations.

THE COURT: All right. Mr. --

MR. HAIMS: We also submitted --

THE COURT: No. Go ahead. I'm sorry.

MR. HAIMS: -- a binder of exhibits.

THE COURT: Yes, but let me deal with the declarations first.

MR. HAIMS: Okay.

THE COURT: Okay.

MR. HAIMS: Sure.

THE COURT: Go ahead, Mr. Glenn. You have objections?

MR. GLENN: Your Honor, Ms. Leung will handle that.

THE COURT: Okay. Ms. Leung?

MS. LEUNG: Kanchana Leung of Kasowitz Benson.

THE COURT: You're going to have to speak into the microphone.

MR. GLENN: You can sit here.

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1 THE COURT: Okay? I want to be sure we have a clear
2 transcript.

3 MS. LEUNG: Kanchana Leung of Kasowitz Benson. As to
4 the declarations, we object to the paragraphs in portions of
5 the Mongelluzzo, Woehr and Scheipe declarations that purport to
6 speak as to the intent of the parties when they negotiated and
7 entered into the shared services agreement. There has been no
8 argument by any party that the agreement is ambiguous and that
9 there is a need for any parol evidence as to intent. And so,
10 we would, as a general subject matter objection, object to all
11 those paragraphs and ask that those be stricken and not
12 considered.

13 THE COURT: Okay. Mr. Haims, you want to address
14 that?

15 MR. HAIMS: Your Honor, we agree that the language
16 says what it says, and is clear in what it says, and that it
17 doesn't provide, as we said, for these productions. However,
18 to the extent that it doesn't and intent is an issue, we
19 respectfully disagree and think that intent is certainly an
20 issue here. And the intent -- to the extent that Your Honor is
21 construing the language, the case law is pretty clear that you
22 could look at intent to see how the specific language is to be
23 construed. Both parties here, Mr. Scheipe, on one side, and
24 the ResCap defendants on the other -- the ResCap declarants on
25 the other side, have testified as to what their intent was in

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1 their negotiations in drafting the agreement. We think it's
2 clear --

3 THE COURT: But if the language --

4 MR. HAIMS: We think it's clear, but if you're going
5 to get --

6 THE COURT: Let me ask this. Under New York -- New
7 York law governs, correct?

8 MR. HAIMS: Correct.

9 THE COURT: If under New York law the language of a
10 contract is clear and unambiguous, parol evidence is not
11 admissible for purposes of determining the meaning of a
12 contract. Do you agree with that?

13 MR. HAIMS: I agree with that.

14 THE COURT: All right. Here's what I'm going to do.
15 I'm going to -- all the declarations are admitted into
16 evidence. The Court is reserving decision about the objection
17 from Ms. Leung with respect to the statements of intent. I
18 have not fully resolved, in my own mind, this issue of whether
19 the agreement is clear and unambiguous and therefore parol
20 evidence should not be considered. If parol is admissible, I
21 think it's fair to say this is the only evidence that's been
22 offered with respect to -- that would be parol evidence, but I
23 haven't decided that. So I'm going to reserve decision on the
24 admissibility of testimony with respect to the supposed intent
25 of the parties. Okay.

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1 (Declaration of Jeffrey A. Lipps in support of debtors'

2 objection to motion of the Federal Housing Finance Agency for

3 relief from the automatic stay was hereby received into

4 evidence as of this date.)

5 (Declaration and supplemental declaration of John G.

6 Mongelluzzo in support of AFI's submission regarding the shared

7 services agreement was hereby received into evidence as of this

8 date.)

9 (Declaration of Mary Fahy Woehr in support of debtors'

10 objection to motion of the Federal Housing Finance Agency for

11 relief from the automatic stay was hereby received into

12 evidence as of this date.)

13 (Declaration of Philip Marc Scheipe in support of AFI's

14 submission regarding the shared services agreement was hereby

15 received into evidence as of this date.)

16 THE COURT: You want to address your --

17 MR. HAIMS: Yeah.

18 THE COURT: -- exhibits?

19 MR. HAIMS: Yeah. We have an exhibit binder --

20 THE COURT: Yes.

21 MR. HAIMS: -- which was submitted. It has --

22 THE COURT: I have that here.

23 MR. HAIMS: -- certain exhibits listed as Exhibits 1

24 through 8. And I'm happy to move them in as one or --

25 THE COURT: Well, let's --

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1 MR. HAIMS: -- take them through, whatever is --

2 THE COURT: -- do it that way. Offer them all and
3 then I'll --

4 MR. HAIMS: I'll offer this binder in evidence.

5 THE COURT: Okay. All right. The debtors' have
6 offered and have presented to the Court an exhibit binder with
7 exhibits premarked as Exhibits 1 through 8 and have now offered
8 them in evidence. Mr. Glenn or Ms. Leung, do you have any
9 exhibits?

10 MR. HAIMS: These are all the exhibits that were
11 attached to our declarations.

12 MR. GLENN: No objection.

13 MR. HAIMS: There's no new --

14 THE COURT: All right. So the documents marked as
15 Exhibits 1 through 8, Debtors' Exhibits 1 through 8, are
16 admitted in evidence for purposes of the hearing.
17 (Debtors' Exhibits 1 through 8 were hereby received into
18 evidence as of this date.)

19 MR. HAIMS: And we have no further evidence, Your
20 Honor.

21 THE COURT: All right. You rest?

22 MR. HAIMS: We rest.

23 THE COURT: You responded that you do rest?

24 MR. HAIMS: Yes, Your Honor.

25 THE COURT: Okay. All right. Just to be clear, Mr.

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1 Glenn, do you wish to cross-examine any of the declarants?

2 MR. GLENN: No, Your Honor.

3 THE COURT: All right. Do you have any rebuttal
4 evidence you wish to offer?

5 MR. GLENN: We do not, Your Honor.

6 THE COURT: All right. You rest as well?

7 MR. GLENN: We do.

8 THE COURT: All right. Now let me hear argument then.
9 Go ahead, Mr. Glenn.

10 MR. GLENN: Thank you, Your Honor. I don't want to
11 take the Court's time on issues that I know the Court has
12 examined closely and that we talked about last time that we
13 briefed on a supplemental basis. I think the Court is in a
14 difficult situation in this case, because it is a very unique
15 case and the Court is being asked to decide a legal question
16 that could have far-reaching ramifications beyond this very
17 unique case. And that is, does the automatic stay apply to
18 third party discovery.

19 We don't think it does for all the reasons we've set
20 forth in our papers. We have addressed the Johns-Manville
21 case. We've talked about all the other cases around the
22 country that go our way. I think as a general rule --

23 THE COURT: Well, let me ask you, Hillsborough
24 Holdings which you rely on --

25 MR. GLENN: Yes.

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1 THE COURT: Judge Paskay's decision in Florida --

2 MR. GLENN: Yes.

3 THE COURT: Manville. Both of those cases involved
4 issues of discovery -- efforts to take discovery from employees
5 of the debtors in those cases, not from the debtors themselves.
6 And in this case, in its present posture, the issue is whether
7 discovery from the debtors should be permitted.

8 MR. GLENN: That's correct.

9 THE COURT: So you had pointed out -- at the last
10 hearing when I raised the issue about Manville, you said there
11 was an adversary pending, that you can't get an injunction
12 without an adversary proceeding, 105 -- your argument that 105
13 can't apply against FHFA. But the issues in those cases where
14 discovery -- I mean, I don't have before me a subpoena from
15 FHFA for present or former officers or employees of any of the
16 debtors. I have a subpoena for production of documents by the
17 debtors themselves. Do you agree with that?

18 MR. GLENN: Yes.

19 THE COURT: I haven't found any decisions at all that
20 address the issue of the power of a bankruptcy court to
21 regulate or limit discovery from the debtor in connection with
22 third party actions. Are you aware of any?

23 MR. GLENN: Under 362 --

24 THE COURT: Let me just --

25 MR. GLENN: -- the answer is no.

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1 THE COURT: Let's put 362 -- my question is really
2 more -- let's assume that I agree with the Ninth Circuit BAP.
3 There really isn't much law on this point.

4 MR. GLENN: That's correct.

5 THE COURT: Okay. But let's assume I agree with the
6 Ninth Circuit BAP that 362(a) doesn't apply to third party
7 discovery from the debtor. You did brief it. You addressed
8 the legislative history and the wording in 362(a) itself. But
9 what I've been pondering is whether 105 provides the Court with
10 authority not to enjoin FHFA, but to extend the protection of
11 362(a) to discovery from the debtor. And it seemed to me in
12 thinking it through that doing so doesn't require an adversary
13 proceeding. It doesn't require an injunction. It is an order
14 -- it would be an order affecting the administration of the
15 case, affecting property of the estate. You may dispute around
16 the margins on this but the estimate of the cost of
17 complying -- the only evidence I have before me with respect to
18 an estimate of the cost of the debtor to comply is probably
19 over a million dollars. There are ranges that are given, and I
20 understand that. I don't want to get into quibbling about the
21 exact dollars from --

22 MR. GLENN: I would dispute that, Your Honor, insofar
23 as our application is concerned. The other application is a
24 different story.

25 THE COURT: Well --

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1 MR. GLENN: And I just want to make that clear
2 because --

3 THE COURT: Well, you've just reduced --

4 MR. GLENN: -- we're being punished for trying to be
5 reasonable in this case. So our application, the way we do the
6 math, Your Honor, just to be perfectly clear, 2,500 loan files
7 times approximately, give or take, twenty-five dollars.

8 THE COURT: Well, for the third party cost to retrieve
9 the files from the vendor --

10 MR. GLENN: Correct.

11 THE COURT: -- no lawyer in his right mind would
12 ever -- you would never produce documents that your office
13 hadn't screened for privilege or any other protection for here
14 issues of confidential borrower information. I mean, you just
15 wouldn't do that.

16 MR. GLENN: Ms. Leung is probably more qualified to
17 handle that, but as I understand it, there is no privileged
18 information in these loan files. The loan files --

19 THE COURT: What about personally identifiable
20 information?

21 MR. GLENN: That there is and that can be addressed,
22 and has been addressed, through a standard confidentiality
23 agreement with all the other defendants. I just don't see that
24 as -- it's an issue, but I don't think that's a cost issue.

25 I didn't mean to sidetrack, Your Honor, so much.

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1 THE COURT: No.

2 MR. GLENN: I just wanted to make my position --

3 THE COURT: No. But here's --

4 MR. GLENN: -- clear.

5 THE COURT: Look, the non-Ally underwriters have said
6 we need all 43,000 loan files. And I understand that Judge
7 Cote said if you think you need it, you apply for it. Well,
8 they've now filed a motion.

9 The issue that I framed was whether 105 provides a
10 source of authority for the Court. I'm going to very -- I want
11 to be careful about -- this is not selected accidentally --
12 regulate discovery in a third party action. And I say
13 "regulate" because to the extent that a debtor or these debtors
14 were to argue to me that no discovery now, no discovery ever
15 from the debtors in connection with third party actions, I
16 think that's an unsupportable position to take.

17 I start with a 350 year old maxim that the public has
18 a right to every man's evidence. It's a proposition that has
19 been repeatedly relied upon by the U.S. Supreme Court, by the
20 circuit courts including the Second Circuit. And what the
21 courts have roughly said is that to limit that, if by statute
22 or if there is some privilege issue, it has to be a well
23 established privilege. And the issue in my mind is about
24 regulating it. Can the bankruptcy court, charged with
25 overseeing these Chapter 11 cases, regulate discovery? When do

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1 you want the documents?

2 MR. GLENN: We want them as soon as we can get them.
3 I believe something in the order of sixty days would work, like
4 six -- about sixty days.

5 THE COURT: So over the next sixty days in this case,
6 there is an enormous amount of activity that's at the very core
7 of Chapter 11 bankruptcy proceedings. There is an auction
8 scheduled, I think, for October 23rd. There are twenty some
9 odd parties that have signed nondisclosure agreements that are
10 engaged in due diligence. If you or one of your colleagues was
11 here this morning, you know that there was extensive colloquy
12 about a contested hearing scheduled for November 5th for which
13 expedited discovery is underway and arguments that the debtor
14 hasn't fully complied with its obligations to produce
15 everything it was required to produce. So there's expedited
16 discovery ongoing for a very important hearing currently
17 scheduled for November 5th, whether it happens then or at a
18 later date, remains to be seen, but it'll happen soon. There's
19 an examiner's investigation going on.

20 There is -- what I think -- you can respond to this if
21 you'd like. I mean -- and I invite you to. With everything
22 that's going on in this case, the debtor has more than its
23 hands full over the next sixty days just to do what it is
24 required to do to move this Chapter 11 case forward. And
25 diverting -- at this time, diverting the resources -- let's put

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1 who pays for it aside. Okay? Just diverting the people and --
2 you know, there was an argument this morning about the
3 creditors' committee has asked for 1,500 loan files for their
4 sampling expert. And there was a dispute as to whether all
5 1,500 were supposed to be produced before today, whether
6 they've now been produced or not, but that's just -- I give
7 that just as an example. There's an enormous amount of work
8 being done. And are you telling me the bankruptcy judge can't
9 say you, FHFA, you can't get your discovery now because of
10 everything that's going on and has to happen in this case very
11 soon. I'm not telling you, FHFA, that you're not going to be
12 entitled to discovery from the debtors. But I, as the judge
13 responsible for this Chapter 11, am telling you you're not
14 getting it now. You're saying that's beyond my power to do.

15 MR. GLENN: Let me start on a more general level, and
16 I'll try to finish there. I think Your Honor posited the
17 question, the more general question, how can the Court regulate
18 discovery -- third party discovery in a complex -- an important
19 Chapter 11 case, such as this, such that that discovery doesn't
20 derail the fundamental purpose of Chapter 11. And I think
21 there are plenty of cases out there that stand for that
22 proposition. And I think that would be underpinning of Your
23 Honor's decision with respect to the other defendants granting
24 the Section 105 injunction dealing with potential
25 indemnification obligations, discovery, collateral estoppel,

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1 res judicata. Those are all the concerns that are appropriate
2 for a Section 105 injunction. And I think that they can be
3 used to limit discovery in appropriate cases and including the
4 asbestos cases are a great example of that. Manville -- that
5 was the central holding in Manville that apart from the bona
6 fides and the merits of the litigation itself, the avalanche of
7 that litigation, including discovery obligations, would
8 restrict, if not eliminate, the company's ability to
9 reorganize. I think Your Honor has that general power and I
10 think that that power is well documented in a long string of
11 cases.

12 In this case, however -- and that's where I want to go
13 back to the beginning of what I said. I think that the case
14 has far reaching ramifications if FHFA were not involved. We
15 happen to be in the unique circumstance of being the
16 beneficiaries of this provision of --

17 THE COURT: Well, you're not exercising police power.

18 MR. GLENN: No, no. But what Judge Cote held and what
19 the Second Circuit held in Colonial Realty is that Congress,
20 for the decision -- for the reasons that we've cited in our
21 papers and in the legislative history of HERA going back to
22 FIRREA has decided that FHFA's work is so important that
23 Congress did not want that work restricted by Courts outside of
24 what HERA is litigating in the Courts in which he is reporting.

25 THE COURT: So you say that that gives FHFA a free

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1 pass. If you decided that you wanted discovery that was going
2 to cost twenty million dollars, I would have no power to
3 regulate or restrict it. That's your view, correct?

4 MR. GLENN: Under HERA, I think the answer is yes.

5 THE COURT: No. Tell me is there any source of
6 authority that I have, in your view, that would permit me to
7 restrict discovery sought from the debtors in this case by FHFA
8 if the uncontroverted evidence established that the cost was
9 twenty million dollars, and it would derail a whole series of
10 matters that are currently scheduled over the next three or
11 four months?

12 MR. GLENN: I don't think Your Honor has to reach that
13 question because of what we've done.

14 THE COURT: Well, I want you to answer that question.

15 MR. GLENN: I'm going to. The answer is no. Your
16 Honor does not have that power.

17 THE COURT: Okay.

18 MR. GLENN: And I'm not here to make any value
19 judgments on that. I'm not here to say it's right or wrong. I
20 think that as a matter of statutory interpretation, starting
21 with Colonial Realty and Judge Cote's opinion the --

22 THE COURT: Even though -- let's assume I agree with
23 you that under Colonial Realty, I can't -- I couldn't -- I
24 mean, the reference was withdrawn with respect to FHFA so it's
25 not an issue for me, as far as I'm concerned. I know it's

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1 being appealed, but that's -- it's just not my issue. And what
2 I'm really asking is not an injunction against FHFA. It is an
3 order that says, in substance, that 362(a) is hereby extended
4 so that discovery in third party actions may not be obtained
5 from the debtors absent further order of the bankruptcy court.
6 It is not specific to FHFA or FDIC. You know, there are 1900
7 plus actions pending around the country; more than that.
8 Thousands of actions pending around the country. The debtors
9 have, and they cited this, at least one stipulation where it
10 was fairly limited discovery. They stipulated, and they
11 agreed.

12 And so, again, I start with the proposition I'm not --
13 they don't get a free pass on discovery in third party actions.
14 Okay. The question is scope, context, timing, burden --
15 burden, I don't mean necessarily the dollars in costs. Those
16 are among the factors that it would seem to me -- and you said
17 I can't take any of that into account if you decided you wanted
18 twenty million dollars. If it was going to cost twenty million
19 dollars to comply, tough luck. Do it.

20 MR. GLENN: Your Honor, I think we have to divide the
21 two questions of cost and authority.

22 THE COURT: No. That's why I asked you a
23 hypothetical.

24 MR. GLENN: Okay. Your Honor, I think the solution to
25 the problem Your Honor identified is to either in this court or

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1 the court in which the matter is presiding for the cost issue
2 to be resolved separately from the legal entitlement to the
3 documents.

4 THE COURT: So you would agree that I could resolve
5 the cost issue and decide that FHFA would only be permitted its
6 discovery if it posts a bond for the estimate of costs in
7 complying and those -- and as soon as that is quantified
8 precisely that those costs will be paid. Do you agree I have
9 the authority to do that?

10 MR. GLENN: I'm not going to concede that Your Honor
11 has that authority, but I will concede that that's an
12 appropriate consideration --

13 THE COURT: Well, either I have the --

14 MR. GLENN: -- that either this Court --

15 THE COURT: -- authority or I don't.

16 MR. GLENN: I --

17 THE COURT: What is your position?

18 MR. GLENN: I think that my personal view, and we can
19 go into this further separately, is that the Court --

20 THE COURT: No. We're going to do it here now. I
21 always love to talk to you, Mr. Glenn, but --

22 MR. GLENN: Well, I know.

23 THE COURT: People will think we're related --

24 MR. GLENN: Ms. Leung will go into --

25 THE COURT: -- or something.

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1 MR. GLENN: Ms. Leung will go into the control issue
2 and where we think the cost should end up. It's a -- I think
3 that the Court -- if we had a subpoena, a normal subpoena, the
4 Court who --

5 THE COURT: You do have a normal subpoena.

6 MR. GLENN: Well, the court out of which the subpoena
7 is issued would have the authority to determine who should pay
8 for the cost.

9 THE COURT: Okay. But let's just focus on that for a
10 minute, okay? And Rule 45 specifically --

11 MR. GLENN: Yes.

12 THE COURT: -- talks about the Court that's issuing
13 the subpoena. And so, that's not this Court; it's the district
14 court, right?

15 MR. GLENN: Correct.

16 THE COURT: Okay. With all respect to Judge Cote, or
17 any other district judge, or any of the state judges around the
18 country, or federal judges around the country that have these
19 matters, I mean, they're not really -- first off, it's not
20 their job to worry about whether these Chapter 11 cases proceed
21 expeditiously in the ordinary course. They have to worry about
22 their specific litigation. One could call it a parochial
23 interest. I think it's certainly an appropriate interest for
24 the judges. In federal court, you know, Judge Cote could
25 address the issue of cost, but that doesn't address the issue

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1 from a standpoint of a debtor whether it's a Chapter 7, or 13,
2 or 11 debtor. That's a particular interest of the bankruptcy
3 court.

4 MR. GLENN: Correct.

5 THE COURT: And again, it would seem to me that when I
6 ticked off potential factors to consider, context -- you know,
7 scope, context, timing, burden, expense, those are all things
8 that a bankruptcy judge should consider. I don't know which
9 way -- the balance they come out differently in different
10 cases.

11 Just let me back up for a second. You didn't -- I
12 take it you resolved the issue about the loan tapes and
13 origination information?

14 MR. GLENN: We did, subject to an issue about the
15 confidentiality agreement.

16 THE COURT: Okay.

17 MR. GLENN: But I'm not here to --

18 THE COURT: You're going to -- right.

19 MR. GLENN: -- to deal with that, Your Honor.

20 THE COURT: Okay.

21 MR. GLENN: I think that there are a couple things I'd
22 like to observe, because we're talking both in terms of general
23 policy considerations, Your Honor, and issues -- practical
24 issues with this dispute. I think that the issue of who should
25 pay for this discovery in this dispute --

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1 THE COURT: I'll get to who pays.

2 MR. GLENN: Okay. Okay.

3 THE COURT: I'll get to who pays.

4 MR. GLENN: I think that if our request were
5 unreasonable, that the scope was an issue, that the cost was an
6 issue, that the timing of production was an issue, that those
7 are practical issues that the Court has -- certainly has some
8 input on just like any other Court would --

9 THE COURT: How are --

10 MR. GLENN: -- that was --

11 THE COURT: What's the source of my authority for
12 input on that?

13 MR. GLENN: Well, you would have jurisdiction to rule
14 on those issues in the first instance.

15 THE COURT: Under what authority?

16 MR. GLENN: Under Rule 45.

17 THE COURT: I don't. I mean, Rule 45 -- it
18 specifically says the Court that issued the subpoena --

19 MR. GLENN: Well, in this case, Your Honor, the
20 district court has deferred to you. And that's what I was
21 getting to on cost. The Court wanted to hear your concerns
22 about the cost and whether this would derail the company's
23 reorganization. The Court did make those comments. I believe
24 it's in the transcript that she did want to hear from you on
25 that. And she cited the Johns-Manville case as a circumstance

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1 where those were considered.

2 THE COURT: Let me ask you another hypothetical.

3 Let's assume not only that it was going to cost ten million
4 dollars for the debtor to comply, and we'll deal with the issue
5 of cost, you want the stuff -- you say -- let's say a district
6 judge, and this is not what Judge Cote has done, let's say the
7 district judge orders that this be produced -- the judge who
8 issues the subpoena says produce it within forty-five days.
9 And the bankruptcy judge who's got the case, not this case,
10 concludes that, you know, producing -- requiring the debtor to
11 produce documents at a cost of ten million dollars in the next
12 forty-five days guarantees this case is derailed and converts
13 to a Chapter 7 liquidation. The bankruptcy judge has no
14 authority to do anything about it?

15 MR. GLENN: In our --

16 THE COURT: Yeah.

17 MR. GLENN: -- particular circumstance --

18 THE COURT: FHFA is the plaintiff or FDIC and says,
19 got to produce this document within forty-five days. It's
20 going to cost ten million dollars. And the debtor comes in
21 with uncontroverted evidence that complying with that subpoena
22 would result in conversion of the case to Chapter 7
23 liquidation. Bankruptcy has no power -- the bankruptcy court
24 has no power to do anything about it.

25 MR. GLENN: It's funny, Your Honor. If I were here

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1 about nine months ago when I represented Borders, I might have
2 a different viewpoint of that --

3 THE COURT: Really?

4 MR. GLENN: -- case. Yes. But what I have to say is,
5 I have to start from the text of HERA. And the text of HERA
6 says that no court can issue any order enjoining or limiting
7 FHFA's activities. So I think we have to draw the line between
8 what is a regulatory -- a discovery burden weighing exercise
9 versus what is -- a court throwing down the gauntlet and
10 saying, no, I'm not infringing -- you don't get it, and I'm not
11 infringing on FHFA.

12 THE COURT: You don't get it now.

13 MR. GLENN: You don't get -- well, that question
14 straddles the line between --

15 THE COURT: Does it?

16 MR. GLENN: -- those two -- it does, Your Honor,
17 because if Your Honor said that it's going to -- you're going
18 to delay the debtors from producing documents for a year, and
19 we have a written discovery deadline of the end of the year.

20 THE COURT: You haven't even had to have motion
21 practice in your case. I understand. Judge Cote issued an
22 order.

23 MR. GLENN: I am subject to an order. My client is
24 subject to an order today for written discovery to end at the
25 end of this year. Whether -- if the Court said you can't get

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1 the documents, whether Judge Cote would default FHFA because it
2 couldn't proceed with its case at that point in time, I would
3 hope --

4 THE COURT: You know, I look with --

5 MR. GLENN: -- I would hope that she would --

6 THE COURT: I look with interest --

7 MR. GLENN: -- be flexible about that.

8 THE COURT: -- on -- I think you cited what I refer to
9 as Winnick I, Judge Lynch's decision in the district court.
10 There's also a Winnick II which is an interesting case. I
11 mean, in that Luzzano case that I had called to your attention,
12 I discussed both Winnick I and Winnick II. Winnick I, Judge
13 Lynch said you've got to produce this discovery. In Winnick
14 II, which was -- Citibank had the documents. It wasn't a party
15 to the case, and they claimed it was too burdensome. And I
16 guess Judge Lynch agreed. And so, Citibank was relieved of the
17 obligation to produce any of the documents, but Judge Lynch had
18 decided that the plaintiffs, as assignees of the claim they
19 were prosecuting, were obligated to do it. It leaves -- I
20 mean, I guess the judge could default the defendant, but that
21 was one of the twists in the Winnick case.

22 But let's say I'm not going to just stay it for a
23 year. I mean there's an auction at the end of October.
24 There's an RMBS settlement hearing scheduled for November 5th
25 which may or may not hold to November 5th. There are a whole

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1 slew of things sort of between now and January that are going
2 to happen in this case where if, based on the uncontroverted
3 evidence and the record in the Chapter 11 cases, I was to
4 conclude that the debtors having to comply now with the
5 subpoena would be seriously prejudiced. It would threaten to
6 derail an important Chapter 11 case and consequently -- look,
7 what I did with respect to the 105 injunction, it runs to
8 October 31. They may come back and say they need it extended
9 for some period or not, but it isn't going to get extended
10 indefinitely. It was not an injunction. You know, and I said
11 in the one that was contested and went to decision, you know,
12 parties are free to take discovery from AFI, but not from the
13 debtors while the stay is in place.

14 So --

15 MR. GLENN: Your Honor --

16 THE COURT: I mean, I see that -- yeah. You want to
17 go the outlier the other way. Judge Cote's ordered, you know,
18 a year discovery cutoff for fact discovery, and, you know, it
19 may be you got to wait three or four months before the debtor
20 has to comply. I don't know what the appropriate period is.

21 MR. GLENN: Those are very difficult questions.

22 THE COURT: That's why I'm asking them, yes.

23 MR. GLENN: And I'm obviously -- I understand that.

24 And I'm doing my best to help the Court. But ultimately, Your
25 Honor has to decide this case based on the record before Your

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1 Honor. And I would point Your Honor to the Mongelluzzo
2 declarations, and I hope I haven't slaughtered that name. But
3 what is conspicuously absent from both of those declarations,
4 and it's interesting to look at the progression between the
5 two. The first one spoke to the situation before the last
6 hearing when it was up in the air exactly how much FHFA --

7 THE COURT: Well, it was 105,000 files.

8 MR. GLENN: Correct. Correct. So if Your Honor goes
9 to the supplemental Mongelluzzo declaration and goes back and
10 forth between the two, there's absolutely nothing in those
11 declarations that says that complying with our request, I
12 should say, with FHFA's request is going to somehow derail --

13 THE COURT: Well, time out.

14 MR. GLENN: -- this reorganization.

15 THE COURT: Wait a second. I mean, you say that the
16 statute prevents me from doing anything to regulate the
17 discovery by FHFA. What does it do with respect to the
18 defendants' -- the nondebtor defendants in your case, to their
19 subpoena?

20 MR. GLENN: I have no idea ,and I will leave it to
21 them to argue that.

22 THE COURT: I see. So, you know, they can't -- I
23 could say you can't get it, but FHFA I can't stop them. They
24 only want, now, 2,500, you want 43,000.

25 MR. GLENN: We don't think they want it. We think

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1 that, putting aside the burden on the debtors, the process
2 here, Your Honor, is the loan files in this litigation
3 effectively have to be re-underwritten. Data's collected, a
4 person who has the capabilities of a loan officer who can
5 determine whether the loan is worthy and meets the underwriting
6 guidelines, has to reexamine them.

7 THE COURT: I think I know the answer to this
8 question, but did you and your experts seek to meet and confer
9 with the defendants' counsel to see whether the experts could
10 agree on an appropriate sampling methodology? I'm sure the
11 answer is you did and they said no, they want all 43,000 files.
12 Do I have that roughly right?

13 MR. GLENN: Not with respect to this in particular,
14 but globally there are many, many securitizations. And if Your
15 Honor were to look at the entire record of all the loan files
16 at issue and all the securitizations in dispute the number is
17 staggering, and we just don't think it's possible, not only
18 within Judge Cote's schedule, but with any reasonable schedule
19 to undertake this process.

20 So there are broader issues at play in the litigation.
21 We're trying to be reasonable. We're trying to work with the
22 Court and work with the debtor to obtain a sample size that
23 achieves our objectives with being able to prove our case with
24 minimizing and hopefully eliminating the burden on the company.

25 Some of their vendors are FHFA's vendors and there are

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1 pricing and other potential efficiencies that we can take
2 advantage of. I think today the question Your Honor has to
3 decide is do we have the legal entitlement to these documents
4 and who should bear the cost.

5 THE COURT: Let me ask you this specifically. Do I
6 have the authority, under Section 105, to extend to the debtors
7 protection against discovery in any action, absent further
8 order of the Court?

9 MR. GLENN: A blanket?

10 THE COURT: Yes. It would -- in words or in substance
11 it would say that in light of the large number of lawsuits
12 pending around the country, from which discovery may
13 potentially be requested or is responsive, and in light of the
14 burden and expense to the debtors of complying with discovery,
15 in order to regulate discovery in aid of administration of
16 these Chapter 11 cases, the Court extends the protection of
17 362(a) to any subpoena or other request for production of
18 documents, from the debtors.

19 MR. GLENN: Not as against FHFA, certainly, because of
20 the reasons we've articulated. But --

21 THE COURT: Well, but that's not an injunction against
22 FHFA. It is saying in the administration of this case, and I'm
23 not saying FHFA can't get that stay lifted on conditions, but
24 it is not an injunction -- it's not an injunction against FHFA
25 proceeding with its action. It is because, I'll just use the

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1 hypothetical to make it easy, I know you say that the costs,
2 particularly when you get down to 2,500 loan files is
3 substantially less, if the burden and expense to the debtor of
4 complying with discovery, it will require use of property of
5 the estate. It will affect the administration of the case, the
6 effective administration of the case, and in aid of that power
7 the Court, using 105, extends the stay, subject to further
8 order of the Court, to any discovery from the debtors.

9 That doesn't seem to me to require a 105, an
10 injunction. It's not an injunction of any outside activity.
11 In Hillsboro Holding it was depositions of present and
12 former --

13 MR. GLENN: Senior officers, right.

14 THE COURT: -- officer or employees. In Manville it
15 was, again, discovery from -- at least that decision -- Judge
16 Bryant's decision was discovery of officers and directors.

17 I understand your argument that, and I subscribe to
18 the law, that to get an injunction against any outside
19 activity, if you will, it's got to be done by adversary
20 proceeding under 7001. But 105 is utilized other than in the
21 injunction context. Just the words of the statute 105(a), "The
22 Court may issue any order, process or judgment that is
23 necessary and appropriate to carry out the provisions of this
24 title."

25 Well, the provisions of this title are intended, under

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1 541, to marshal and protect the assets and the property of the
2 estate in Chapter 11 dealing with administration of the case.
3 The kind of order that I'm asking you about is designed
4 specifically not to extend powers beyond what the Code does,
5 but to apply the powers that the Code already contains to a
6 context that's slightly different.

7 MR. GLENN: I think the answer is no, Your Honor,
8 unfortunately. I think that --

9 THE COURT: Let me just say, I haven't found any cases
10 one way or the other.

11 MR. GLENN: I was going to say, I haven't heard of a
12 case that says that. I think that Rule 7001 doesn't just say
13 injunction, it says other equitable relief.

14 THE COURT: Against a third -- against some party.

15 MR. GLENN: Yes.

16 THE COURT: So if I -- look, it isn't even on -- the
17 debtors sought an injunction against FHFA, Judge Cote withdrew
18 the reference, she made a determination, no stay. I'm not
19 making any effort to second guess that.

20 MR. GLENN: I think that those are the types of
21 matters that probably have a practical solution, because what
22 Your Honor is saying that the -- given what Your Honor has
23 either taken judicial notice of or seen in a first day hearing,
24 seen in other similar complex cases, Your Honor could establish
25 guidelines that before a party can come in and get this kind of

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1 discovery they would have to prove that that is not going to
2 derail the reorganization, cost -- have a cost that's
3 prohibitive or other matters so that it would be more of a
4 controlling the docket type of approach to solve a practical
5 problem. But as a blanket matter to issue an order that has
6 either a direct or indirect effect of enjoining third parties,
7 I don't think Your Honor could do that without an adversary
8 proceeding.

9 THE COURT: Address the expense issue.

10 MR. GLENN: I'm sorry?

11 THE COURT: Address the expense issue.

12 MR. GLENN: Your Honor, what I would like to do for
13 that is cede the podium to Ms. Leung on the control issue,
14 which I think is the issue which is the major issue of expense.

15 THE COURT: Okay. Fine.

16 MR. GLENN: Thank you.

17 MR. HAIMS: Your Honor, before she does if I could
18 make one quick, just, note.

19 THE COURT: I can't hear you, Mr. Haims.

20 MR. HAIMS: Oh, I'm sorry.

21 Before she starts I just want to make one quick point.
22 We just got an e-mail that the Second Circuit has stayed the
23 FHFA case, has issued an order today, and that it's going to be
24 pending full briefing on the motion for a stay, which is going
25 to be heard on September 25th. I just wanted to bring that to

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1 your -- we just got an e-mail, and I wanted to bring that to
2 the Court's attention.

3 THE COURT: Okay. All right. Thank you. We'll
4 continue on though. Go ahead, Ms. Leung.

5 Can I -- let me just before -- the application that I
6 understood was before the Second Circuit was in the UBS case.

7 MR. HAIMS: The application was by UBS for all of the
8 FHFA cases.

9 THE COURT: For all of them? Okay. All right. Go
10 ahead, Ms. Leung.

11 MS. LEUNG: And I just wanted to address that briefly.
12 As we set forth in our letter response yesterday,
13 regardless of the UBS appeal, this case was still go forward.

14 THE COURT: Just pull the microphone a little closer.

15 MS. LEUNG: This case would still go forward, because
16 there are fraud and aiding and abetting fraud claims again --

17 THE COURT: Not if the Second Circuit stays it, it
18 won't.

19 MS. LEUNG: Right. But that's not an issue that --
20 the legal issue that's before the Court. So --

21 THE COURT: No, I -- it may be that the issue before
22 the Second Circuit is a narrower one, but if they stay the case
23 the case is stayed, but we'll see what they order.

24 Go ahead.

25 MS. LEUNG: Okay. Before I get to the control issue I

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1 do want to clarify something for the record. Before Your Honor
2 was speaking in terms of Rule 45 subpoenas. In fact there is
3 not a Rule 45 subpoena against the debtors. There may be some
4 confusion because several years ago, I believe in 2010, FHFA
5 issued a number of subpoenas to different servicers including
6 RFC and GMAC Mortgage LLC, which does cover loan files. So
7 there is an outstanding subpoena to the debtors, but it wasn't
8 in the context of the litigation, and it wasn't issued out of
9 the district court as part of the litigation.

10 THE COURT: So you're telling me there's no
11 outstanding -- I mean, they're not a party to your action,
12 correct?

13 MS. LEUNG: Correct.

14 THE COURT: And therefore, in order to take discovery
15 from them you have to proceed by Rule 45?

16 MS. LEUNG: Well, not exactly, Your Honor. We are in
17 an odd procedural posture because of the way that we got here,
18 and I think we've been very clear that FHFA's position is that
19 Ally has control over the loan files and various other
20 documents. Ally should be producing those documents as part of
21 party discovery, whether or not it's actually in the possession
22 or custody of the debtors, and that Ally should bear the costs
23 of that production as a party. And our understanding is that
24 Judge Cote wanted you to decide the bankruptcy issues in the
25 first instance, but we've always tried to get these documents

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1 through party discovery, not third party discovery.

2 THE COURT: Okay.

3 MS. LEUNG: And the papers that were submitted by the
4 debtors don't -- or Ally, don't undercut that position at all
5 and that only confirms our position, as set forth in our
6 papers, that Ally does have control over the loan files.

7 As Your Honor correctly seized upon the last time we
8 were here, the relevant legal issue is whether Ally has access
9 or the ability to obtain the documents and the shared services
10 agreement is clear on that front.

11 The record services statement of work is clear on its
12 face that it covers litigation requests, and it's also clear
13 that it covers loan files. In fact, in paragraph 28 of the
14 Mongelluzzo supplemental declaration, the debtors concede that
15 as part of records services they provide loan files to Ally
16 upon request.

17 It's also clear, on the face of the agreement --

18 THE COURT: They just didn't think that 5,000, 2,500,
19 104,000, 42 -- 43,000 would have to be produced at one time?

20 MS. LEUNG: Maybe, maybe not. I can't speak to that.
21 But it is clear, on the face of the agreement, that ResCap does
22 not have discretion to turn down a request. In Section 6(b) it
23 says "During the term of the statement of work ResCap will
24 provide all services under the terms and conditions of the
25 statement of work." And ResCap argues that despite the plain

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1 words of the statement of work that other provisions of the
2 agreement support their conclusion that they're not required to
3 produce the loan files. For example, they argue that the
4 timeframe for responding to requests is a day turnaround and if
5 the parties had contemplated a request for thousands of loan
6 files, that that would make no sense.

7 But in fact ResCap bargained for more time to complete
8 services and for more staffing in Section 7(a)(5) of that
9 statement --

10 THE COURT: Give me that section again?

11 MS. LEUNG: 7(a)(5) --

12 THE COURT: Uh-huh.

13 MS. LEUNG: -- of the statement of work under
14 performance standards it says, "Any references to established
15 timelines herein refers to Exhibit D. ResCap may change such
16 established timelines and will provide AFI with an updated
17 Exhibit D. To the extent there are material changes in
18 ResCap's established timelines, ResCap and AFI shall work
19 towards establishing mutually agreeable timelines."

20 In addition, in Section 7(b)(1), Remediation
21 Processes, it provides for additional staffing. It says, "If
22 ResCap reasonably determines that there is inadequate staffing
23 or staffing that lacks necessary training or skills to meet the
24 service level agreements set forth in Section 7(a), AFI agrees
25 to work reasonably with ResCap to address any such deficiencies

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1 in staffing or skill sets."

2 So the agreement, on its face, provides for
3 contingencies such as large order requests for documents. So
4 their -- the provisions they cite that say -- that they argue
5 undercut a plain reading of the statement of work, we think
6 don't support that reading, in fact quite the opposite that
7 they bargained for and gave themselves maximum flexibility for
8 things -- for unforeseen circumstances like a large request for
9 loan files. We think that that's clear on its face.

10 As for the fee structure, the parties -- ResCap and, I
11 think, Ally also concedes that the agreement provides for Ally
12 to pay for services. So even though there's a basis --

13 THE COURT: I had some question whether they're
14 limited to that 50,000 dollars for document production services
15 versus potentially millions that it's going to cost to do it.

16 MS. LEUNG: But I think the debtors clearly -- I think
17 the agreement clearly states that the pass-through costs would
18 be absorbed by Ally. So it appears that most of these pass-
19 through costs would be the costs of the vendor to retrieve the
20 documents and not actually ResCap costs or personnel time or
21 labor in terms of identifying the loan files. That most of
22 that cost is actually in the retrieval.

23 THE COURT: Is there anything in the shared services
24 agreement or the statements of work that -- let's assume that
25 AFI requested ResCap to produce 43,000 loan files, is there

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1 anything in the shared services agreement or the statement of
2 work that addresses how quickly ResCap would have to comply
3 with the request?

4 MS. LEUNG: Other than what I just read into the
5 record, not that I'm aware. It just gives them flexibility to
6 do it in more time than what's in Exhibit D.

7 THE COURT: Okay. So that, for example, if Judge Cote
8 ordered Ally to produce 43,000 loan files and this Court
9 determined that yes they should produce it over a different
10 timeline, beginning ninety days from now when things settle
11 down in the case and setting out reasonable parameters as to
12 when it should be done, is there anything in the shared
13 services agreement or the statements of work that would limit
14 this Court's ability to set out that timetable?

15 MS. LEUNG: Not that I'm aware.

16 THE COURT: Okay.

17 MS. LEUNG: Also, for the shared services agreement we
18 have pointed out the legal services statement of work and the
19 reason we think that that also supports ResCap's obligation to
20 provide loan files, is it shows that ResCap is required to
21 facilitate access to documents and --

22 THE COURT: Let me put it -- let me just stop you
23 there; I'll let you go on. I've actually read these pretty
24 carefully.

25 MS. LEUNG: Okay.

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1 THE COURT: I think you have the much stronger side of
2 the argument on the point of whether -- I don't think you
3 can -- I mean, it's -- I don't think I can order Ally to
4 request the documents; I think Judge Cote could. I don't think
5 if I said produce them under these documents that ResCap would,
6 as a result of my order that they produce them, would trigger
7 the response -- the obligation of Ally to pay for it.

8 I think if -- I mean, I approved the entry into the
9 shared services agreement. I believe I can, therefore -- it
10 was presented to me by AFI and the debtors and I approved it
11 and I believe I can have the power to interpret it. If Judge
12 Cote ordered them to it and they -- and she directed them to
13 forward that request to the debtors, I think she could
14 certainly deal with, to the extent necessary, the cost issue.
15 I think if she ordered them to do it, I think, since I approved
16 this agreement I could interpret it, hypothetically, as saying
17 okay you've got to do it, Ally's got to pay for it under these
18 sections.

19 But I'm -- you can gather from my colloquy with Mr.
20 Glenn that my focus isn't so much whether documents have to be
21 produced but when they have to be produced and who bears the
22 cost of having to do it. Those are -- you know, I haven't
23 decided any of this at this point but those are my principal
24 concerns.

25 I just -- they're in court several times a week and we

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1 have this very, very full docket, all front-loaded in this case
2 between now and the end of this year. It may spill over into
3 early next year. There'll be stuff that obviously goes on
4 after that but we are jam-packed with very time-intensive
5 things that are going on, such that having to comply in the
6 next sixty days with -- you say, well, you're only asking for
7 2,500 now; the other side in your cases want 43,000, a much
8 heavier burden from it.

9 The task of complying -- I don't think one side should
10 get its discovery and the other side get shut out. So it's as
11 much an issue -- what's the scope of the request, what's the
12 context in which it's being asked, what's the timing, what's
13 the burden, what's the expense, those are the things that I'm
14 focused on.

15 I'll let Mr. Haims address the issue. I'm not -- I'm
16 taking this under submission today. I think you've got the
17 much stronger side of the argument about what this shared
18 services agreement requires ResCap to do if AFI asks for it.
19 That request hasn't been made yet. And Judge Cote could order
20 AFI to request the documents from ResCap.

21 I think the issue that the debtors have raised and
22 Ally -- AFI raised it in their filing here, I don't care who
23 owns the stuff. It doesn't make any difference who owns this
24 data or the documents. That's a red herring issue as far as
25 I'm concerned.

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1 MS. LEUNG: Well, we agree with that. I think that
2 where it would be helpful is for -- an interpretation of this
3 agreement would be helpful to the district court because of
4 AFI's position that they can't ask or do anything or take
5 copies of the documents, for some reason, because of the
6 bankruptcy stay. That is the position that they have set forth
7 in terms of objecting to our document requests and in the
8 district court, that the automatic stay prevents them from
9 getting copies of these documents.

10 So we have stated very clearly we think that the
11 shared services agreement is a method by which they can request
12 the documents that Your Honor has already ruled on that.

13 THE COURT: Well, I know Mr. Glenn disagrees with my
14 view that 105 is a potential -- I'm not deciding it yet -- the
15 potential source of power for the Court to say no discovery
16 absent further order of this Court from the debtors. The
17 shared service agreement, not to the contrary withstanding, and
18 even though that agreement was entered into post-petition,
19 approved post-petition, I think I would still, under my
20 analysis, have the ability to regulate AFI's discovery from the
21 debtors as well.

22 Again, none of this is to say that -- I mean, I've
23 said it already. Okay. Anything else?

24 MS. LEUNG: Well, to the extent that the stay does
25 apply, Your Honor already did rule on that issue when you

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1 approved the shared services agreement. There is a -- I don't
2 have it in front of me but there is a paragraph in that order
3 that says that the stay is lifted to the extent necessary to
4 fulfill the shared services agreement.

5 So to the extent that it does apply --

6 THE COURT: So you'd say I would have -- your view is
7 I would have no -- if ResCap said look, we've got twenty-seven
8 similar lawsuits pending against us, Ally says we've got
9 twenty-seven similar lawsuits pending us around the country.
10 It involves not 43,000 loan files; it involves 105,000 or
11 200,000 loan files, every loan file that ResCap has control
12 of -- possession of -- let's put control aside -- we need them
13 and we need them in the next sixty days, you don't think I
14 would have the power to say not so fast?

15 MS. LEUNG: Well, I'm out of my element when it comes
16 to bankruptcy law, but I believe that Your Honor ruled on the
17 basis of Section 105 as to discovery in those cases and that
18 does not apply to FHFA.

19 THE COURT: Until October 31st. Well, it's -- okay.
20 Thank you, Ms. Leung.

21 MS. LEUNG: Thank you.

22 THE COURT: Mr. Haims?

23 Let me raise a couple other questions with you, while
24 you come up.

25 MR. HAIMS: Oh, sure.

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1 THE COURT: I'll listen to your argument. I mean, I
2 thought -- I was not particularly taken by the factual showing
3 that you made as to the -- your vendors don't have to provide
4 more than 1,500 files a month and it's going to take thirteen
5 months or thirteen years or you figure it out to provide it. I
6 mean, you're -- the showing you made is without additional cost
7 they wouldn't produce more -- there is no judge that I know who
8 would give you several years -- let's assume that they could
9 take discovery, okay? There's no judge I know who would say
10 okay, it may take you a year or two to produce the documents
11 because your vendor is only under contract to do 1,500 a month
12 without additional expense. So that's unpersuasive.

13 I mean, you seem to have acknowledged, but not really
14 addressed, that you have the ability to request much more
15 expedited but costly service. The issue of who pays for it is
16 a different issue, okay. How quickly -- tell me this, Mr.
17 Haims, if you had to produce 43,000 loan files and somebody
18 else was going to pay for it, so cost is not an issue, how
19 quickly could you produce them?

20 MR. HAIMS: As we say in the papers -- in the
21 documents, it's going to be nine months.

22 Now, we don't control --

23 THE COURT: Mr. Haims, I can't believe that. I
24 just --

25 MR. HAIMS: We don't control the vendors. We can ask

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1 the vendors. You're right, that we -- there's additional --

2 THE COURT: Oh, they'll be more than happy to provide
3 expedited service at a substantial cost.

4 MR. HAIMS: Well, but there are lots of other
5 productions going on at the same time. So this is not the only
6 -- this is not a standalone production. Things are different,
7 for example, when the MBIA case was done several years ago --

8 THE COURT: Why was it different?

9 MR. HAIMS: This was pre-bankruptcy. We didn't have
10 all of the other loan file pulls that we were doing now, the
11 governmental reviews, the committee reviews, the due diligence
12 on the sales, none of that. So we haven't gotten the list of
13 loan files. We don't know where those loan files are. We
14 don't know in how many warehouses they're housed in. We don't
15 know in what states. We don't know whether east coast, west.
16 We don't know any of that at this point in time.

17 THE COURT: Okay. And tell me this --

18 MR. HAIMS: So it's hard to say --

19 THE COURT: -- if FHFA gives you a list -- let's put
20 FHFA aside. The other defendants in the FHFA cases give you a
21 list of 43,000 loan files, what do the debtors have to do to
22 determine where the files are?

23 MR. HAIMS: The debtors have to run those 43,000 loan
24 numbers through fourteen databases, find out -- that will pull
25 up where those loan files --

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1 THE COURT: How long is it going to take to do that?

2 MR. HAIMS: What we estimate, it's going to be about a
3 day of processing for each database. These are batch --

4 THE COURT: How many databases are there?

5 MR. HAIMS: Fourteen.

6 THE COURT: Okay.

7 MR. HAIMS: And then --

8 THE COURT: They can't be run simultaneously in
9 fourteen databases?

10 MR. HAIMS: Mr. Mongelluzzo can talk better than I can
11 about that. But the answer -- I understand the answer is --

12 THE COURT: Do you know the answer to that?

13 MR. HAIMS: I understand the answer to that is no.

14 THE COURT: Why not? Is he here?

15 MR. HAIMS: He is here.

16 THE COURT: Ask him the question.

17 MR. HAIMS: Sure.

18 THE COURT: I want to know how long -- if you -- for
19 43,000 loan files can searches of four databases --

20 MR. MONGELLUZZO: Fourteen.

21 MR. HAIMS: Fourteen.

22 THE COURT: -- fourteen databases, can they be run
23 simultaneously?

24 MR. MONGELLUZZO: There's two issues, Your Honor. One
25 is that we would -- they -- some of the loans are in some

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1 databases and some are in others. So until you exclude it from
2 the first database you don't move to the second. It's just the
3 way the IT batching process works, and I'm not an IT expert so
4 I can't explain to you why we have those system constraints.
5 We're dealing with multiple systems that are legacy systems.
6 So whenever we've had to do large searches like this, i.e. the
7 MBIA case, it basically takes us three to four weeks to go
8 through all of that processing and do all the reconciliation
9 till we can finally tell you exactly where everything is.

10 THE COURT: Okay. Thank you. Thank you very much.

11 So let's say it takes two weeks to figure out where
12 the loan files are. Then what does it take to get them back?

13 MR. HAIMS: You've got to ask the vendors.

14 THE COURT: Okay.

15 MR. HAIMS: The vendor's got to pull them.

16 THE COURT: And do you have -- I mean, vendors -- my
17 experience is that the vendors have -- you have a contract, and
18 I understand it limits the number that they have to do. But
19 they've got a cost sheet, and my recollection is the cost --
20 the more quickly you need it, the greater the cost. And so if
21 after you identify the location in your fourteen databases,
22 where the location of those files are, I don't know how many
23 vendors we're talking about.

24 MR. HAIMS: Primarily two --

25 THE COURT: Okay.

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1 MR. HAIMS: -- but it could be more.

2 THE COURT: Your two vendors, if you told them we need
3 all of those files in a month, they would quote you a cost for
4 providing the expedited service of getting those files. Mr.
5 Glenn said, what, sixty days, was that the period you were --

6 MR. GLENN: Yes.

7 THE COURT: Okay. If you said we need the 43,000
8 files in sixty days, your two -- Iron Mountain is one of them?

9 MR. HAIMS: Yes.

10 THE COURT: And who's the other?

11 MR. HAIMS: Kenwood, I believe.

12 THE COURT: Okay. Iron Mountain will give you a quote
13 for retrieving, I don't know, whatever the number is that's
14 with them and it'll be quantified as a dollar amount and it'll
15 be expensive, but they'll give you a quote. It won't take nine
16 months to do it. Am I right or wrong?

17 MR. HAIMS: Assuming they're doing nothing else, and
18 again these are not necess -- this has never been done, as I
19 understand here, so with -- by the debtors.

20 THE COURT: Oh, really?

21 MR. HAIMS: By the debtors.

22 THE COURT: Oh, well by the debtors.

23 MR. HAIMS: By the debtors.

24 THE COURT: Do you know how often --

25 MR. HAIMS: Yeah.

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1 THE COURT: -- Iron Mountain is one of the main
2 document --

3 MR. HAIMS: Agreed.

4 THE COURT: -- retention -- multiple facilities in the
5 country and how often in complex litigation they're getting
6 requests? They love it because they can charge an arm and a
7 leg for doing it.

8 MR. HAIMS: I mean, again, Mr. Mongelluzzo could
9 probably just talk about it better. Sure. You're going to pay
10 them whatever you want to drop everything else. These are not
11 only our vendors, our documents are stored with other servicers
12 and other companies. Could they do it quicker? I would assume
13 so. For any price someone will do something quicker.

14 THE COURT: Okay. So I am directing the debtors to
15 obtain a quote from their vendors for retrieving 43,000 loan
16 files sixty days -- within sixty days after the vendors get the
17 request. Okay. You say it's going to take you two weeks to do
18 it, to identify where they are, I don't know, you can probably
19 make some rough allocation how many Iron Mountain has and how
20 many your other vendor has, you can approximate it. But I want
21 to see what the cost is for doing that. Okay. I don't want to
22 find out it's going to take nine months because it's not. It
23 isn't going to happen.

24 I can tell you, if I rule for FHFA and this matter
25 goes back to Judge Cote, do you think she's going to give you

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1 nine months to produce the documents? I don't think so.

2 MR. HAIMS: Okay, Your Honor. We will do that. When
3 would you like that?

4 THE COURT: Within a week.

5 MR. HAIMS: Okay. Can I just confirm with my client?

6 THE COURT: Yeah. In other words, I'm not asking you
7 to figure out where the loan files are now, I'm not asking you
8 to run the fourteen databases. What I'm asking for you is to
9 get quotes from your two vendors of what the cost would be of
10 retrieving files within a sixty-day period after you identify
11 them.

12 MR. HAIMS: Can I consult before I agree with it?

13 THE COURT: Yes, go ahead. Yeah.

14 MR. HAIMS: Okay.

15 (Pause)

16 MR. HAIMS: Mr. Mongelluzzo raises two concerns. One
17 is, he doesn't know whether they would do it and get us a quote
18 within a week. But more importantly, he thinks they're going
19 to come back and say unless we know where the files are, we
20 can't -- because there are multiple locations, unless we know
21 how many files we have and where they're located we can't do
22 it. We can ask them.

23 THE COURT: How many locations? Do you decide where
24 the files go?

25 MR. HAIMS: My understanding is no. But we could ask

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1 them for that information, Your Honor.

2 THE COURT: Okay. I want you to ask them.

3 MR. HAIMS: Okay. We will do that.

4 THE COURT: And I want a written response.

5 All right. Go ahead. You have a reply that you want
6 to make?

7 MR. HAIMS: Yeah. So I don't think that the anti-
8 injunction provision is applicable here. We are not saying --

9 THE COURT: 105 is not an anti-injunction -- is not an
10 injunction.

11 MR. HAIMS: No, no. I'm sorry, the hearing anti-
12 injunction provision.

13 THE COURT: Okay.

14 MR. HAIMS: We have not said no discovery ever. We
15 haven't said that for anybody, in fact for -- we've given some
16 discovery to some parties, and what we're saying -- we're not
17 asking this Court for an injunction enjoining their case.
18 Their case, to the extent the Second Circuit allows it to go
19 forward, is going to go forward -- is going forward and is not
20 going to be impeded other than the deadline for document
21 production in that one case will slip. Other than that, the
22 case itself is not being impeded.

23 This is no different, I submit, to the order from
24 Judge Cote at the outset of the case, as I understand, staying
25 certain parts of the Ally case pending a decision on the motion

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1 to dismiss in the UBS case. And I don't think it's any
2 different than Judge Cote issuing an order putting the Ally
3 case in tranche 4 for trial three years down the road versus --
4 behind the UBS --

5 THE COURT: Yes, but Judge Cote gets to decide that,
6 not me.

7 MR. HAIMS: Agreed. But the FHFA --

8 THE COURT: Put it this way, if -- for example, if I
9 ruled that FHFA can't get the discovery for six months, just
10 hypothetically, and Judge Cote says that's all well and good; I
11 order that they produce all the documents in sixty days; if
12 they don't I'm going to enter their default. That's, kind of,
13 like Winnick II (ph.). Do you know what -- have you read
14 Winnick II?

15 MR. HAIMS: No. But -- I suspect --

16 THE COURT: I mean, I don't have any control over what
17 Judge Cote does with respect to Ally; that's for her to decide.

18 MR. HAIMS: Agree, Your Honor. What we're saying here
19 is that I disagree with Mr. Glenn's position that you are
20 powerless to not grant their motion here because of --

21 THE COURT: I want to see him argue that in the next
22 case he comes in.

23 MR. HAIMS: -- because of the anti-injunction
24 provision. Because we haven't said -- we are not asking you
25 here to enjoin their case. They have hundreds of subpoenas,

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1 they and the underwriter defendants, to get the same loan
2 files. They already have hundreds of thousands of loan files;
3 they may even have some of these.

4 THE COURT: Let me stop you a second. Are you
5 suggesting that somebody other than the debtors have these loan
6 files?

7 MR. HAIMS: It's certainly possible that other debtors
8 have -- that people other than the debtors have copies of these
9 loan files. Yeah, that's correct.

10 THE COURT: Other than speculating about it, do you
11 have any --

12 MR. HAIMS: No, because we don't know -- I don't have
13 a list of the loan files they're looking for.

14 THE COURT: Well, do you know what the 43,000 loan
15 files that the non-Ally underwriters are talking about?

16 MR. HAIMS: Do I have a list of those? No, Your
17 Honor.

18 THE COURT: Have you made any effort to ascertain what
19 loan files they're talking about? They're specific
20 securitizations, right?

21 MR. HAIMS: Uh-huh. Uh-huh.

22 THE COURT: You don't need them to tell you what the
23 loans are that are in those securitization trusts?

24 MR. HAIMS: To find the loan files, Your Honor. The
25 loan files --

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1 THE COURT: Not to find the loan files.

2 MR. HAIMS: The record -- again, Mr. Mongelluzzo is in
3 charge of records. The files are not stored or sorted even by
4 securitization. So is it possible that there are loans in the
5 securitization that we no longer have the files for? Sure.

6 THE COURT: It's pure speculation.

7 MR. HAIMS: Pure speculation, sure. But all of this
8 is until we see what the loans actually are that want.

9 THE COURT: Okay. You know, under Rule 45 or even
10 Rule 34, one of the factors for the Court to consider is
11 whether the documents could be obtained more easily from
12 another party.

13 MR. HAIMS: Uh-huh.

14 THE COURT: That's for Ally to argue with Judge Cote.
15 All right. Go ahead.

16 MR. HAIMS: So we don't think the anti-injunction
17 provision has any bearing on this issue.

18 Secondly, to say that this is only limited to 2,500
19 now or 5,000 is --

20 THE COURT: All they're asking for is 2,500.

21 MR. HAIMS: In their motion papers they specifically
22 reserve the right to ask for all 43,000. They've -- in
23 communication with Judge Cote, and this is part of our
24 exhibits, have asked for -- said that they're going to be
25 asking for all e-mails and they're going to be asking for all

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1 of the documents. That dispute has already been teed up before
2 Judge Cote and they specifically said they're going to -- they
3 want those documents from the debtors.

4 THE COURT: Do you have all of Ally's e-mail files?

5 MR. HAIMS: There are custodians in the case. There
6 are, I think, thirty -- from the communications that we've
7 read, there are thirty some-odd custodians in the case from
8 which they want documents.

9 THE COURT: You know, I've got enough problems with
10 this current one.

11 MR. HAIMS: Right.

12 THE COURT: When the next one comes before me I'll
13 deal with that.

14 MR. HAIMS: Well, but to say that this is limited only
15 2,500 I don't think is the case. And I think we have to look
16 to see what's -- whether the granting of these 2,500 leads to
17 the next 43,000 and the next e-mail and when the other --

18 THE COURT: Well, that's why I ask --

19 MR. HAIMS: -- twenty-seven cases --

20 THE COURT: That's why I asked Mr. Glenn just assume
21 that complying with discovery is going to cost ten million
22 dollars and tank the case if it has to be done within a
23 schedule, he adheres to his absolutist position that I have no
24 power to alter that.

25 MR. HAIMS: I disagree with that position. And then,

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1 I guess, the last --

2 THE COURT: That wasn't quite what he said. Close.

3 Close.

4 MR. HAIMS: And then the last provision -- the last
5 point I would just make is on the shared services agreement.
6 We have not taken the position that Ally, if they asked for
7 documents under the shared service agreement for the loan
8 files, they couldn't get them.

9 What we've taken the position is that would be an
10 additional service that would have to be negotiated. There's a
11 specific provision in the agreement that says if it's a service
12 not covered by the agreement, the parties could sit down and
13 negotiate --

14 THE COURT: Producing loan files is covered by the
15 agreement, isn't it?

16 MR. HAIMS: Well --

17 THE COURT: Yes or no?

18 MR. HAIMS: Producing small numbers of loan files --

19 THE COURT: Does it say that?

20 MR. HAIMS: -- in the ordinary course of business.

21 THE COURT: Does it say that? Does it say small
22 numbers of loan files in the ordinary course of business?

23 MR. HAIMS: Well we think, and that's why we put in
24 the --

25 THE COURT: No. Just say it: does it say that?

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1 MR. HAIMS: Does it specifically say?

2 THE COURT: Yeah.

3 MR. HAIMS: It says -- no.

4 THE COURT: Okay. Just go over the fee structure
5 because I was a little unclear about -- are you capped at
6 50,000 dollars a month?

7 MR. HAIMS: For the fixed monthly costs, it's capped
8 at 50,000 dollars for the record services, yes. And that's for
9 pulling the loan files and all of the other enumerated records.

10 THE COURT: You pass through any third party costs?

11 MR. HAIMS: Third party costs, correct.

12 THE COURT: So if Iron Mountain charged three million
13 dollars, that would be a pass-through cost --

14 MR. HAIMS: That's correct.

15 THE COURT: -- under the shared services agreement?

16 MR. HAIMS: Correct. The 50,000, as I understand it,
17 deals with the time of the in-house employees to pull those
18 files.

19 THE COURT: And if Morrison & Foerster put thirty
20 paralegals and twenty lawyers the task of reviewing those files
21 before they were produced, that would be passed-along cost?

22 MR. HAIMS: That's correct.

23 So what we're saying is there is provision in this
24 agreement; this is just not covered by it.

25 THE COURT: Does Ally disagree with what you and I

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1 just said?

2 MR. HAIMS: I'd let Ally speak to themselves on that
3 one.

4 THE COURT: Okay. All right. Anything else before I
5 hear from Ally's counsel?

6 MR. HAIMS: No, Your Honor.

7 THE COURT: Thank you, Mr. Haims.

8 MR. BROWN: Your Honor, I'll take that as my cue.

9 Judson Brown from Kirkland & Ellis on behalf of Ally.
10 And I just want to address, for a moment, the record services
11 statement of work that you've been discussing with FHFA and the
12 debtors' counsel here.

13 It's our view that that statement of work is clear and
14 does not cover a request for the loan files at issue here, and
15 let me read a provision from that --

16 THE COURT: Go ahead.

17 MR. BROWN: -- statement of work for you.

18 In section 7(a), Your Honor, the final paragraph of
19 that section of the statement of work, the third sentence reads
20 as follows: "In addition, any deliverables in this statement
21 of work must be consistent with historical practice and
22 services provided must be delivered with the same standard of
23 care, diligence, priority and frequency with which the services
24 were provided immediately prior to the date hereof."

25 THE COURT: Let me ask you this, as AFI been a

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defendant in any litigation in the past involving any loans?

MR. BROWN: Other than the FHFA lawsuit, Your Honor?

THE COURT: Yes.

MR. BROWN: Has AFI?

THE COURT: Yes.

MR. BROWN: Sure.

THE COURT: Okay. And in any of those litigations,
prior into the entry into the shared services agreement, did
you request production of loan files from the debtors?

MR. BROWN: Pursuant to this statement --

THE COURT: No.

MR. BROWN: -- of work or generically?

THE COURT: No, no, no, generic. Did you -- in other
words, you acknowledged that AFI has been a defendant in
lawsuits involving mortgage loans and underwriting loans and
all that, correct?

MR. BROWN: AFI has been a defendant in those types of
lawsuits.

THE COURT: And in any of those lawsuits, before the
shared services agreement was entered into, did AFI request
that any of the now debtors pull the loan files for them to
review?

MR. BROWN: For AFI?

THE COURT: Yes.

MR. BROWN: No, Your Honor.

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1 THE COURT: Never?

2 MR. BROWN: No, Your Honor. This record services
3 statement of work, Your Honor, is meant to cover loan files for
4 Ally Bank, not for AFI. Separate and different. And
5 historically the request for those loan files has been small in
6 nature, nothing like the ones --

7 THE COURT: I don't want to know whether they're small
8 in nature because until the litigation bomb exploded on the
9 mortgage servicing and origination business, of course they
10 were small in number. But that changed; changed before this
11 bankruptcy.

12 MR. BROWN: Right. But just to track the language of
13 this record service, consistent with historical practice,
14 Ally -- AFI has never made a request of this sort. And so at
15 best, Your Honor --

16 THE COURT: Yeah, but the statement of work
17 specifically covers -- I don't have the words open in front of
18 me but basically is litigation support.

19 MR. BROWN: At best, Your Honor, this statement of
20 work is ambiguous. What this discussion reveals is this
21 statement of work, at best, is ambiguous as to what it covers
22 and thus the testimony that the debtors have offered, from the
23 various witnesses, particularly to the intent behind the shared
24 services agreement and this statement of work would thus be
25 relevant for Your Honor to consider.

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1 THE COURT: You know, at the point where -- how many
2 lawsuits was AFI a defendant in involving origination or
3 servicing of loans at the time these debtors filed their
4 Chapter 11 petitions?

5 MR. BROWN: Your Honor, off the top of my head I don't
6 know that number for you right now.

7 THE COURT: Quite a few?

8 MR. BROWN: Your Honor, honestly I just don't know the
9 number.

10 THE COURT: Mr. Haims, I'm only able to listen to one
11 at a time, okay?

12 And you're saying AFI didn't get any document requests
13 in any of those litigations before?

14 MR. BROWN: No, and let me explain that Your Honor.
15 It's not the case that AFI was sued individually and ResCap
16 wasn't a defendant. In those --

17 THE COURT: Oh, I know they were defendants. I know
18 you were all in that same pot.

19 MR. BROWN: And so AFI didn't have to make a request
20 to ResCap for any loan files and it never did so. ResCap was
21 in the case of the defendant and it was asked to produce those
22 loan files. And so there is no historical practice to track
23 the language of this statement of work where AFI requests loan
24 files from the debtors.

25 Your Honor, I only wanted to address this --

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1 THE COURT: Okay. That's fine.

2 MR. BROWN: -- particular statement of work. Do you
3 have anything else that I could answer?

4 THE COURT: No, I don't. I don't. Thank you very
5 much.

6 MR. BROWN: Thank you, Your Honor.

7 THE COURT: Mr. Haims, you wanted to be heard again?

8 MR. HAIMS: Thank you, Your Honor. I just wanted to
9 clarify that in historical precedent the -- ResCap was a
10 defendant in all those cases. In the MBIA case it was ResCap
11 who made the production itself, not at the direction of Ally or
12 to Ally or at its direction.

13 THE COURT: All right. Anybody else wish to be heard?

14 MS. MOSKOWITZ: Yes, Your Honor.

15 THE COURT: Come on up.

16 MS. MOSKOWITZ: Thank you.

17 Lauren Moskowitz, I represent Credit Suisse and I'm
18 here on behalf of the non-Ally underwriter defendants.

19 If it's appropriate for this motion, I didn't know if
20 you were setting it aside separately.

21 THE COURT: Well, I'm going to hear your motion when
22 it's on the calendar, which isn't today. But I'll -- you did
23 file in connection with this motion so I'll certainly hear you.

24 MS. MOSKOWITZ: Okay. Thank you.

25 With respect to the number of loan files at issue we,

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1 as Your Honor knows from our submission, do not agree that the
2 appropriate number is 5,000, let alone the 2,500.

3 THE COURT: All right. So let me ask you this,
4 though, let's assume -- you want 43,000 loan files. Let's just
5 assume, hypothetically, that the cost of producing 43,000 loan
6 files is five million dollars. Are your clients ready,
7 willing, I know they're able but -- are they ready to advance
8 the funds against an accounting after the documents are
9 provided?

10 MS. MOSKOWITZ: Your Honor, the non-Ally underwriter
11 defendants are willing to discuss cost sharing.

12 THE COURT: No, I didn't ask whether they're willing
13 to discuss. If the Court were to order on an appropriate
14 timetable that ResCap provide all 43,000 files, are your
15 clients prepared to pay the debtors' costs, direct and indirect
16 costs, including the vendors' costs, the attorneys' time in
17 reviewing -- in producing the files, all of that costs, subject
18 to review by the Court, are they prepared to pay that cost?

19 MS. MOSKOWITZ: If FHFA is contributing and the
20 other -- all defendants are contributing, yes, Your Honor, we
21 are.

22 THE COURT: Well, Mr. Glenn only wants 2,500 files,
23 you want 43,000 and Judge Cote ordered if you want more go to
24 the bankruptcy court. So you'll soon be here asking for 43,000
25 files. Mr. Glenn, for now, is asking for 2,500. He has --

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1 well, and what I wanted -- so if -- the factors that I talked
2 about earlier, including cost, are factors that the Court
3 considered, I mean even under Rule 45, which I don't -- it
4 might provide guidance to me but I didn't issue a subpoena, I
5 mean when I say I this Court didn't issue a subpoena. But one
6 of the subsections of Rule 45 deals with cost. I guess it's
7 Rule 45(b)(3)(C)(ii), (C) is specifying conditions as an
8 alternative. In the circumstances described in Rule
9 45(c)(3)(B) "The Court may, instead of quashing or modifying
10 the subpoena, order appearance or production under specified
11 conditions if the party served," and then "(ii) ensures that
12 the subpoenaed person will be reasonably compensated."

13 Now I don't think that applies, by its terms, to what
14 I have but let's assume it provides guidance to me in deciding
15 what to -- if I were to decide that 105 allows me to regulate
16 discovery from the debtors, I look to that subsection as
17 providing guidance. My specific question is, are you prepared
18 to pay the costs of the 43,000 files you want.

19 MS. MOSKOWITZ: We are prepared to share reasonable
20 costs among the defendants. Yes, Your Honor.

21 THE COURT: All right.

22 MS. MOSKOWITZ: With respect to how those should be
23 shared, however, we disagree that FHFA should be responsible
24 only for the 2,500. We're happy to talk to Judge Cote about
25 that if that's the appropriate forum to discuss allocation.

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1 But we disagree with the position they're taking here today,
2 with the constant reduction in the files so that they can, I
3 think the language was, one -- so that they could do what they
4 needed to do to carry their burden, but leave no room for what
5 we need to do to carry our burden and defend against the claims
6 that they've brought. Our due process concerns are of
7 paramount concern here given that what they're effectively
8 requesting is what they want for their case but let us wait or
9 perhaps not get at all what we need for our defenses.

10 THE COURT: And that wasn't -- my question is let's --
11 I mean, timing, as I've explained, is a factor. But -- and
12 I -- you heard my expressions of skepticism about nine months
13 to produce the files. But if the debtors are required to
14 provide them, I think someone else should be paying the cost,
15 okay. It may -- it would undoubtedly take longer to produce
16 43,000 files than 2,500 files, but assuming a reasonable
17 timeframe and all that, I come back -- one thing I didn't raise
18 with Ms. Leung or with Mr. Glenn is I didn't ask whether FHFA,
19 in order to get this discovery, is prepared to agree to waive
20 any claim it wishes to file in these bankruptcy proceedings
21 because certainly the production of documents, you may need
22 them to prosecute your actions against the other defendants,
23 but I don't think there's any mistake about the fact that you
24 want them to substantiate a claim to file in the bankruptcy
25 cases against the debtors.

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1 In granting the 105 injunction in the one case that
2 went to decision, I believe I identified the risk of issue
3 preclusion as an appropriate -- and the cases identify that as
4 an appropriate consideration. I don't have the 105 issue about
5 enjoining prosecution of the AFI -- the case against AFI is not
6 before me, but it does, certainly, in deciding scope context,
7 context includes whether a party wishes to -- that's seeking
8 discovery today say I need it for this other action, but do
9 they intend to use that information in the claims allowance
10 process before the Court?

11 You, on behalf of the non-Ally underwriters indicate
12 in your papers your claims for indemnification. So the same
13 factor comes into account, you want to be able to use whatever
14 information you get, not only to defend the actions -- the
15 action -- the actions before Judge Cote, but also to bolster a
16 claim that you would assert against the debtors in this case.

17 MS. MOSKOWITZ: No, Your Honor. I think the
18 indemnification is for the underwriters' legal fees and any
19 ultimate liability that they suffer. And so, to the extent
20 that we need these files to defend ourselves, we're actually
21 protecting the assets of the estate to some extent because
22 anything --

23 THE COURT: Are you entitled -- if there's a judgment
24 in the securities against your clients are you entitled to
25 indemnification?

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1 MS. MOSKOWITZ: Yes, Your Honor, and we have filed a
2 proof of claim in this court.

3 THE COURT: These are 33 Act claims against your
4 client?

5 MS. MOSKOWITZ: As well as state Blue Sky Law claims
6 as well.

7 THE COURT: Okay. Well, I'm not going to reach that
8 now. But, I mean, when I'm talk about context, the context is
9 important, is the party who's seeking the discovery from the
10 debtor or the debtors' defendants in the actions before the
11 bankruptcy, have the parties seeking discovery indicated their
12 belief that they have a claim against the debtors that are
13 likely to be asserted in the claims allowance process? Those
14 are all, it seems to me, to be factors that go to the context
15 in which the discovery request rises.

16 But with all that said, I think whether the party is a
17 plaintiff or a defendant in an action outside of the bankruptcy
18 court it's entitled to the evidence to prosecute or defend the
19 claims. Timing becomes -- and burden and expense become a big
20 issue.

21 MS. MOSKOWITZ: Yes, Your Honor. And that is -- that
22 is appropriate for Your Honor to consider, and we're willing to
23 work with the debtors as well in working out a schedule.

24 We also would like to get these files sooner rather
25 than later, of course, because we are subject to the same

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1 timing as the FHFA is in the case that's pending in front of
2 Judge Cote.

3 THE COURT: Okay. Thank you.

4 MS. MOSKOWITZ: Thank you, Your Honor.

5 THE COURT: Anybody else want to be heard?

6 MS. FREJKA: Good afternoon, Your Honor. Elise
7 Frejka, Kramer, Levin, Naftalis & Frankel appearing on behalf
8 of the committee.

9 The committee wants to echo most of the comments of
10 the Court regarding the cost, the distraction, and the timing.
11 We support the debtors in this position and feel that expedited
12 discovery, at this critical time in the case, will distract the
13 debtors from the current, very important deadlines that are
14 ahead in the coming months.

15 The committee also feels that the cost should not be
16 borne by the debtors. That these loan file expenses should be
17 borne by the defendants along the lines as just suggested.

18 THE COURT: Well, it may be -- I mean, it -- I mean,
19 Judge Cote could well decide the expenses should be borne by
20 Ally. Usually the -- by AFI, because usually with our system
21 is -- the issue for third party discovery is more acute about
22 expenses, but ordinarily the party bears its own costs for
23 discovery.

24 MS. FREJKA: And we -- the committee is aware of the
25 cost, and I think that it's probably some place between where

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1 the two parties are suggesting the number is, but it does have
2 the ability to ever expand as requests expand and the committee
3 just wants to be sensitive to what those costs are and where
4 they should be allocated and passed through under the shared
5 services agreement.

6 THE COURT: Well, other than this Court deciding that
7 under the agreement that it approved that -- if the Court were
8 to decide that AFI is -- if AFI, either because it's ordered to
9 by the district court or it decides, for its own defense, it
10 needs it, requests 43,000 loan files, that the cost -- that
11 they bear the pass-through costs for providing it and perhaps
12 more than the 50,000 a month or not. And it may be appropriate
13 for this Court to decide that the one thing that's clear is
14 that the debtors shouldn't bear the cost, that under the shared
15 services agreement AFI is potentially responsible for the cost.
16 But the issue of whether AFI or FHFA, I have trouble with that
17 all the time, FHFA or the other underwriter defendants should
18 bear the cost that does seem to me to be for Judge Cote to
19 decide, not for me to decide. This is discovery in an action
20 pending before her not before me.

21 MS. FREJKA: I don't think we disagree with that. I
22 think we just raise the issue of the cost to the estate --

23 THE COURT: Okay.

24 MS. FREJKA: -- as well as the timing. And I think
25 that you've reached those same points.

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1 THE COURT: I've addressed them, let's put it that
2 way.

3 MS. FREJKA: You've well addressed them.

4 THE COURT: I haven't decided them, but I've addressed
5 those issues.

6 MS. FREJKA: Yes, you have. Thank you.

7 THE COURT: Thank you, Ms. Frejka. Anybody else wish
8 to be heard? You want the last word, Mr. Haims?

9 MR. HAIMS: Your Honor, just two quick --

10 THE COURT: Okay.

11 MR. HAIMS: One is on the schedule for the additional
12 submission. Just as I was sitting here I remembered that next
13 week is Rosh Hashanah, I will not be in Monday and Tuesday.

14 THE COURT: I won't either.

15 MR. HAIMS: So if we could have it past that date,
16 Wednesday or Thursday when I get back.

17 THE COURT: I thought Friday, a week from -- I'm
18 talking about the end of next week, by Friday of next week.

19 MR. HAIMS: Thank you, Your Honor.

20 And lastly, I think we had heard from the underwriters
21 as to whether they are going to assert their claim against the
22 debtors, and I don't know if we've ever heard from FHFA whether
23 they intend to do it as well.

24 THE COURT: I'm going to be surprised, but go ahead,
25 Mr. Glenn.

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1 MR. GLENN: Your Honor, we're not prepared to waive
2 our claims and --

3 THE COURT: I didn't expect you to.

4 MR. GLENN: -- in the claims allowance process the
5 irony is that we could then issue a subpoena under the rule --
6 the 7000 rules and get it as party discovery ironically.

7 THE COURT: No, it would be a contested matter under
8 9014 and the discovery rules, subject to the way the Court
9 would regulate it, would apply. But, of course, in the claims
10 allowance process estimation of a claim can be a much more
11 truncated and expedited proceeding than a district court
12 action.

13 MR. GLENN: That's correct.

14 THE COURT: So it wouldn't necessarily -- and look,
15 the completion of the litigation before Judge Cote, as
16 efficient as she is, will be, you know, with appeals is a time
17 consuming process. I think that the estimation process is
18 designed to deal with the situation where you can't really,
19 finally quantify a claim in the time needed to resolve a case.
20 Those issues aren't before me, but one shouldn't assume that
21 the same discovery, the same process applies in the claims
22 allowance process as would apply in the district court for any
23 action.

24 MR. GLENN: To answer the Court's question, the answer
25 is no. We're not preparing to waive our claim.

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1 THE COURT: I didn't expect you would.

2 MR. GLENN: Thank you.

3 THE COURT: Thank you.

4 All right. Anybody else wish to be heard?

5 MS. MOSKOWITZ: Your Honor, just one procedural
6 question for you, something Your Honor said just raised a
7 question in my mind. We did make our submission on behalf of
8 the non-Ally underwriter defendants according to Your Honor's
9 schedule for supplemental submissions --

10 THE COURT: Right.

11 MS. MOSKOWITZ: -- on FHFA.

12 THE COURT: You did.

13 MS. MOSKOWITZ: So to the extent that Your Honor is
14 taking evidence, we would move for admission of the exhibits
15 submitted.

16 THE COURT: Well, you have a separate motion pending
17 so we'll wait till we get to your motion.

18 MS. MOSKOWITZ: Is that scheduled for some separate --

19 THE COURT: I don't know. Is it on the calendar, Mr.
20 Haims?

21 MR. HAIMS: I think it's actually noticed for today.

22 MS. MOSKOWITZ: That's what I thought.

23 THE COURT: It is? I'm sorry.

24 MR. HAIMS: I think in their notice they noticed it
25 for the same day.

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1 THE COURT: I'm sorry.

2 MS. MOSKOWITZ: I'm sorry; that's what I thought. So
3 I was just confused.

4 THE COURT: I apologize.

5 MS. MOSKOWITZ: So if --

6 THE COURT: I read everything, but I just -- I don't
7 focus, sometimes, on those little details.

8 MS. MOSKOWITZ: Right.

9 THE COURT: What is it that you're offering in
10 evidence?

11 MS. MOSKOWITZ: Your Honor, we would offer the
12 submission, which is docket number 1293 and the exhibits
13 submitted thereto, which are docket numbers 1293-1 through -9,
14 which it would include the affidavits, or declarations rather,
15 of two experts, Professor Arnold Barnett and Professor Chris
16 James, which are respectively 1293-9 and 1293-8, as well as the
17 underwriter or the defendants' submission, across all actions,
18 to the court on June 6th, which was 1293 --

19 THE COURT: When you say submissions I'm only
20 interested in the evidence.

21 MS. MOSKOWITZ: The evidence are those two exhibits
22 that were submitted in support that I just cited to Your Honor.

23 THE COURT: 1293-8 and 1293-9?

24 MS. MOSKOWITZ: Yes, Your Honor.

25 THE COURT: Are there any objections to those

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1 declarations?

2 MR. HAIMS: No, Your Honor.

3 THE COURT: Mr. Glenn?

4 MR. GLENN: We're not a party to that motion. I don't
5 believe that motion is directed to us.

6 THE COURT: Okay.

7 MR. GLENN: We're not taking any position on any of --
8 anything in their pleadings.

9 THE COURT: Okay. All right. So the two declarations
10 that are ECF docket number 1293-8 and 1293-9 are admitted into
11 evidence for purposes of this hearing.

12 (Declaration of Professor Arnold Barnett was hereby received
13 into evidence as Credit Suisse's Exhibit 1293-8, as of this
14 date.)

15 (Declaration of Professor Chris James was hereby received into
16 evidence as Credit Suisse's Exhibit 1293-9, as of this date.)

17 MS. MOSKOWITZ: Thank you, Your Honor.

18 THE COURT: I'm going to take the matter under
19 submission. I do -- I am working on this but I want to see the
20 specific additional information that I requested that the
21 debtors provide with respect to the cost of producing within
22 sixty days the approximately 43,000 loan files. Okay?

23 UNIDENTIFIED SPEAKER: Yes, Your Honor.

24 THE COURT: All right. We're adjourned. Thank you
25 very much.

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MS. MOSKOWITZ: Thank you.

(Whereupon these proceedings were concluded at 3:51 PM)

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I N D E X

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	Declaration of Mary Fahy Woehr in support of debtors' objection to FHFA's motion for relief from the automatic stay		
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regarding the shared services agreement

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CREDIT	DESCRIPTION	ID.	EVID.
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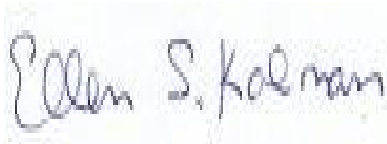
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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript is a true and accurate record of the proceedings.



ELLEN S.KOLMAN

AAERT Certified Electronic Transcriber CET**D 568

eScribers

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New York, NY 10040

Date: September 12, 2012

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